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is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Courts below have given the plaintiff a decree. Kaniz Fatima, who purchased the property from Musammat Sadiq-un-nissa in 1893, comes here in second appeal.

In my opinion the first plea in the memorandum of appeal must be sustained. The plaintiff's benamidar was given an opportunity to redeem and failed to avail himself of it. In my opinion it is now too late for the plaintiff to come in and treat the order absolute passed against his benamidar as a nullity. It has been held in many cases that a decision passed in a suit brought by a benamidar binds the beneficial owner. I see no reason why a similar rule should not be applied to the case of a suit brought against the benamidar. In my opinion the plaintiff is bound by the decree in Waris Ali's suit and he has lost his right of redemption. It may be that, as representing Ali Jan, he may pay the money due to the prior mortgagee if an application is made for the sale of the property, but in my opinion his suit, as brought, ought to have been dismissed.

For the above reasons I allow the appeal and set aside the decrees of the Courts below. The appellant will have her costs in all Courts.

Appeal decreed.

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June 18.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

ABDUL HAMID (PLAINTIFF) *v.* RIAZ-UD-DIN (DEFENDANT).*

Civil Procedure Code, section 506—*Arbitration—Reference made orally, but reduced to writing by the Court—Irregularity.*

Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was *held* that it was not open to the Court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act. *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (1) distinguished. *Shama Sundram Iyer* v. *Abdul Latif* (2) and *Luxumibai* v. *Hajee Widina Cassum* (3) followed.

THIS was an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against

* Civil Revision No. 34 of 1907, against the decree of Muhammad Sirajuddin, Judge of the Court of Small Causes, Agra, dated the 9th of March 1907.

(1) (1855) 6 Moo. I. A., 134. (2) (1899) I. L. R., 27 Calc., 61.
(3) (1899) I. L. R., 23629.

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the opposite party. On the 21st of December 1906 the Judge of the Court of Small Causes recorded a proceeding stating that the parties, being identified by their respective vakils, stated that they agreed to accept any decision on the case which should be given by one Babu Tika Ram, vakil, and that they agreed to pay him any reasonable fee for arbitration, the fee to be paid by them in equal shares. Thereupon the Court made a reference of the matters in dispute to the arbitration of Babu Tika Ram and fixed his fee at Rs. 45, ordering the parties each to pay in one half of this sum. He fixed the time within which the arbitrator was to return his award. The following day the plaintiff stated that he had paid his half share of the fee fixed for the arbitrator and asked that the defendant might be ordered to pay his half share. Upon this the Court ordered the defendant to pay his half share to the arbitrator or deposit it in Court by the 4th of January 1907. The defendant not having paid his share of the fee, the plaintiff, on the 4th of January 1907, paid it in on his behalf and asked that the payment should be included in the costs of the case. Upon this the Court ordered the parties to nominate another arbitrator who would not charge any fee. This not having been done, the Court superseded the arbitration and itself passed a decree in the case. The plaintiff then applied in revision to the High Court contending that, the case having been referred to the arbitration of Tika Ram with the consent of the defendant, and the said arbitrator not having refused to act, the defendant should not be allowed to withdraw from the reference without valid cause, and also that under the circumstances stated the Court below had no jurisdiction to supersede the arbitration and proceed with the trial of the suit.

Maulvi *Ghulam Mujtaba* and Babu *Satya Chandra Mukerji*, for the applicant.

The Hon'ble Pandit *Sundar Lal* and Babu *M. L. Sandal*, for the opposite party.

AIKMAN, J.—This is an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against the opposite party. On the 21st of December 1906 the Judge of the Court of Small Causes recorded a proceeding stating that the parties, being identified by their respective

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The learned vakil who appears for the opposite party contends that the reference was invalid on the ground that there was no application in writing, as required by the last paragraph of section 506 of the Code of Civil Procedure, and in support of his contention relies on the case of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (1). That case was under a special Regulation

(1) (1855) 6 Moo. I. A., 134.

of the Bombay Presidency, and the application for arbitration was a private one and not one made in the course of any suit. It has been distinguished in the case *Shama Sundram Iyer* v. *Abdul Latif* (1), where it was held that the second paragraph of section 506 is directory only and that in a case where both parties consented to a reference to arbitration and where the order of reference was made by the Court in the presence of their counsel or advocates, though not upon a written application, such a reference is not a nullity, but merely an irregularity not affecting the merits of the case or the jurisdiction of the Court. The Privy Council case was also distinguished in the case *Luxumibai* v. *Hajee Widina Cassum* (2). In my opinion when the parties applied orally to the Judge, and the Judge reduced their application to writing and then made a reference, it was not open to him, having regard to the provisions of section 10 of the Code, to supersede that reference, the arbitrator not having declined to act.

I accordingly allow the application, set aside the decree of the learned Judge of the Court of Small Causes, and direct that the case be dealt with in the manner provided by his order of the 21st of December last, an extended date being fixed within which the arbitrator shall give his award. If the defendant does not, within a reasonable time, pay in his share of the arbitrator's fee, it shall be received from the plaintiff and be included in the costs.

The applicant will have the costs of this application in any event.

(1) (1899) I. L. R., 27 Calc., 61. (2) (1899) I. L. R., 23 Bom., 629.